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LEONARD L. STEVENS,
CLERK

No. 83-1050

IN THE

Supreme Court of the United States

October Term, 1983

PHILLIP EMRICH and ERIC GILLBERG,

Petitioners,

vs.

TOUCHE ROSS & CO.,

Respondent.

PHILLIP EMRICH and ERIC GILLBERG,

Petitioners,

vs.

SAM BATTISTONE, SR., *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit.

BRIEF OF RESPONDENTS IN OPPOSITION
TO PETITION FOR CERTIORARI.

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**BRIEF OF RESPONDENTS IN OPPOSITION
TO PETITION FOR CERTIORARI.**

This Brief in Opposition addresses only the action known as *Phillip Emrich and Eric Gillberg v. Sam Battistone, Sr., et al.* The Respondents for whom this brief is submitted are not parties to the action known as *Phillip Emrich and Eric Gillberg v. Touche Ross & Co.*, a related case decided by the Court of Appeals in the same memorandum as the decision in *Phillip Emrich and Eric Gillberg v. Sam Battistone, Sr., et al.*

OPINION BELOW.

The Order of the District Court for the Central District of California is unreported. The Memorandum of the Court of Appeals for the Ninth Circuit which Petitioners ask this Court to review is also unreported, as is the Court of Appeals' Order Denying Petition for Rehearing. The District Court's Order and the Court of Appeals' Memorandum and Order are set out in the Appendix to the Petition for Certiorari ("Petitioners' Appendix").

JURISDICTION.

The jurisdictional prerequisites are adequately set forth in the Petition.

Questions Presented.

1. Whether certiorari should issue to review an unpublished memorandum decision of the Court of Appeals, with no precedential effect, affirming an exercise of discretion by the District Court determining, under a state rule of attorney conduct and the factual record before the Court, that Petitioners' counsel should be disqualified from representing Petitioners against Respondents in this case.

2. Whether certiorari should issue to review a legal contention of Petitioners concerning Rule 23(e) of the Federal Rules of Civil Procedure, not raised below, relating to an issue that was expressly not reached by the Court of Appeals.

STATEMENT OF THE CASE.

Background.

This lawsuit arises out of the sale and purchase of certain securities issued by Sambo's Restaurants, Inc. ("Sambo's") in the late 1970's. The securities were sold primarily to employees of Sambo's. Each of the Respondents, who were all officers and/or directors of Sambo's at the time, purchased the securities. (Respondents' Appendix (attached hereto) at A-1, A-6, A-9, A-12, A-14.) After the securities were sold, the management of Sambo's changed; Sambo's in turn changed several accounting practices relating to the securities; and, as a result, the securities became substantial liabilities for the purchasers.

A number of the purchasers of the securities, including several members of Sambo's' former management, organized the purchasers into a cohesive group to discuss possible strategies, including litigation, to protect their investment in the securities. (Respondents' Appendix at A-1 - A-2, A-6, A-9.) The group organized under the title of "Joint Venture 77-78 Group Association" (the "Association"), and retained counsel to advise it. Several members of Sambo's' former management (including several of the Respondents) became members of the Association and others (including several of the Respondents) contributed funds to the Association to help pay for legal fees. (Respondents' Appendix at A-11, A-12.)

The Association retained the law firm of Latham & Watkins to represent the purchasers of the securities. Once retained, Latham & Watkins examined whether the interests of Sambo's' former management were coincident with, or in conflict with, the interests of the other members of the Association. Latham & Watkins concluded that there was no conflict and proceeded to develop the facts for possible

litigation.

Meetings were held between Latham & Watkins and members of the Association, including several of the Respondents. (Respondents' Appendix at A-7, A-9 - A-10, A-13, A-14.) Members of Latham & Watkins made presentations during these meetings and requested and received funds for legal expenses from several of the Respondents. (Respondents' Appendix at A-7 - A-8, A-10 - A-11, A-13, A-14.) An attorney for some of the Respondents spoke personally with a member of Latham & Watkins in early July 1980 about Latham & Watkins' litigation plans. The Latham & Watkins attorney expressly stated that, in view of the strategy that Latham & Watkins had developed for the investors, there was no conflict of interest between the former management of Sambo's who were investors and the other investors. The Latham & Watkins attorney urged all members of former management to join the Association and to contribute to a litigation fund.

In early August 1980, a member of Latham & Watkins met with several of the Respondents and urged them to contribute both money and information to the Association. (Respondents' Appendix at A-13, A-14.) Three of the Respondents — who had been officers of Sambo's at the time that the securities were sold or thereafter — contributed all of the information they had which was relevant to the facts being developed by Latham & Watkins on behalf of the Association, including confidential information. (Respondents' Appendix at A-3 - A-4, A-7, A-10.)

The Muller Action.

On August 25, 1980, less than two weeks after Latham & Watkins' meeting with several of the Respondents, Latham & Watkins filed a class action in the Central District of California against Sambo's and other institutions on behalf

of all purchasers of the securities, including all of the Respondents. *Muller v. Sambo's Restaurants Inc., et al.*, United States District Court for the Central District of California, No. CV80-3757-R (JRx) ("Muller"). (Respondents' Appendix at A-4, A-8, A-10.) The complaint alleged that the prospectuses by which the securities had been sold were false and misleading and, as such, violated the Securities Exchange Act of 1933 and the Securities Act of 1934, and constituted common law fraud. No members of Sambo's' former management were named as defendants in the *Muller* action. Rather, they were within the alleged plaintiff class.

On the basis of the allegations in the complaint that the prospectuses were false and misleading, it was obvious to any experienced securities lawyer that at least some members of former management whose names appeared in the original prospectuses for the securities could have been named in good faith as defendants in the lawsuit, if their counsel so chose. Latham & Watkins, sophisticated securities lawyers, decided that it was in the interests of the class to have Sambo's' former management as part of the plaintiff class of purchasers, rather than as defendants. Later, Sambo's objected to the inclusion of its former management within the plaintiff class. Latham & Watkins vigorously defended its inclusion of Sambo's' former management within the class, but the District Court ruled to exclude them.

Several of the Respondents continued to remain active in the Association after the filing of the *Muller* action. Believing that Latham & Watkins continued to represent the interests of all purchasers of the securities, including Sambo's' former management, three of the Respondents gave approximately \$8,000 to the Association to pay for the litigation. (Respondents' Appendix at A-4, A-8, A-11.)

Approximately eight months after the filing of the *Muller* complaint, the law firm of Latham & Watkins substituted out as class counsel in favor of the law firm of Mullen & Stabile. Three months later, the law offices of Josef D. Cooper (now succeeded by Cooper, Kirkham & McKinney) and the law firm of Bretz & Hennigan associated with Mullen & Stabile as class counsel. Later the law firm of Stoll & Stoll was also associated with Mullen & Stabile as counsel for the class. Latham & Watkins has never denied that it shared with its successor, Mullen & Stabile, Latham & Watkins' entire work product, including all information supplied to Latham & Watkins by Respondents. Mullen & Stabile has never denied that it shared with its three co-counsel Latham & Watkins' entire work product, including all information supplied to Latham & Watkins by Respondents.

The Instant Action.

In September 1981, the law firms that then represented the class in the *Muller* action, without the firm of Mullen & Stabile¹, filed this action against the Respondents on behalf of the class as ultimately defined in *Muller*, i.e., all purchasers of the securities except members of Sambo's' former management. The action was filed in the Central District of California and assigned to the same judge to whom the *Muller* action was already assigned. (Petitioners' Appendix at A-23 - A-24.) The complaint in this action, alleging wrongdoing in the sale of the Sambo's securities in the late 1970's, is a virtual carbon copy of the *Muller*

¹Mullen & Stabile are conspicuous by their absence as counsel of record in this case. However, as the Ninth Circuit pointed out, on both the Excerpt of Record and the Designation of Record filed with the Ninth Circuit, Mullen & Stabile is listed as counsel for Petitioners. (Petitioners' Appendix at A-28.)

complaint. (Petitioners' Appendix at A-22.) Only the defendants in the two actions are different; while *Muller* was filed against Sambo's and other institutions, this action was filed against individual members of Sambo's' former management.

The Motion to Disqualify Counsel.

Local Rule 2.5.1 of the United States District Court for the Central District of California provides that the Rules of Professional Conduct of the State Bar of California govern the conduct of attorneys practicing before the District Court. Rule 4-101 of the Rules of Professional Conduct of the State Bar of California provides that

a member of the State Bar shall not accept employment adverse to a client or former client, without the informed and written consent of the client or former client, relating to a matter in reference to which [the attorney] has obtained confidential information by reason of or in the course of his employment by such client or former client.

Respondents promptly moved in the District Court to disqualify counsel for the class on the ground that their representation constituted a violation of Rule 4-101. Respondents also moved to dismiss the complaint filed against them by such counsel and to enjoin the disclosure of confidential information.

In support of their motion, Respondents submitted declarations that (a) five of the Respondents had been expressly assured by Latham & Watkins and leaders of the Association that they would not be sued by the class, (b) that five of the Respondents had contributed money to the class' litigation efforts or to the Association, and (c) that three of the Respondents had provided confidential information to Latham & Watkins in preparation for the *Muller* litigation.

(Respondents' Appendix at A-1 - A-15.) Respondents contended under Rule 4-101 that, just as Latham & Watkins would have been precluded from suing Respondents after acting as their counsel and receiving their confidential information, present class counsel, which had substituted in place of Latham & Watkins and received all of Latham & Watkins' work product, could not — without Respondents' consent, which was neither sought nor obtained — represent the class against Respondents in this action.

In opposition to Respondents' motion, attorneys from each of the three class counsel law firms submitted nearly identical declarations stating that they personally had had no substantive discussions with any attorneys from Latham & Watkins; however, each said nothing about his communications with Mullen & Stabile. (Petitioners' Appendix at A-51, A-56, A-61 - A-62.) Gary Stabile of Mullen & Stabile, the immediate successor to Latham & Watkins, also submitted a carefully worded declaration which stated that Latham & Watkins never provided "*confidential information whose source was identified as any of the defendants in this action.*" (Emphasis added) (Petitioners' Appendix at A-51.) Mr. Stabile further declared that he had not relayed any information to present class counsel "*which was obtained from Latham & Watkins regarding any of the defendants.*" (Emphasis added) (Petitioners' Appendix at A-51 - A-52.) One member of Latham & Watkins — not the member who held the extensive discussions with the Respondents — declared that he personally had never met Respondents nor passed on any information received from them. (Petitioners' Appendix at A-73.)

None of Petitioners' declarations denied (a) that attorneys from Latham & Watkins had had extensive factual discussions with Respondents, (b) that Latham & Watkins had received money from Respondents, (c) that Latham & Wat-

kins had developed the *Muller* action on the basis of information received from Respondents, (d) that Latham & Watkins had turned over its entire work product to, and shared all of its impressions with, Mullen & Stabile, or (e) that Mullen & Stabile had turned over all of Latham & Watkins' work product to, and shared all of its impressions with, its three co-counsel firms.

On this record, after hearing oral argument, the District Court granted Respondents' motion, disqualified Petitioners' counsel and dismissed the action without prejudice.

The Appeal.

Class counsel appealed, and the Court of Appeals for the Ninth Circuit, in an unpublished memorandum decision without precedential value, affirmed the District Court's order.² The Court of Appeals observed Petitioners' carefully worded declarations and held, on this record, that the District Court had not abused its discretion in disqualifying Petitioners' counsel under Rule 4-101 of the Rules of Professional Conduct of the State Bar of California, without requiring further proof by Respondents. At no point did the Court of Appeals ever articulate any evidentiary presumptions, rebuttable or irrebuttable. Rather, the Court declined to interfere with what it termed the District Court's resolution of matters of credibility as to factual issues underlying its decision. (Petitioners' Appendix at A-29.) Finally, finding that Rule 4-101, relating to confidential information, was alone sufficient support for the District Court's order, the Court of Appeals expressly did not reach any issue presented by Latham & Watkins' promise to Respondents

²Pursuant to the Rules of the United States Court of Appeals for the Ninth Circuit, such a memorandum decision is not published and is without precedential value. 9th Cir. R. 21(a), (c).

that they would not be sued by the class.³ (Petitioners' Appendix at A-30 - A-31.)

³The Court of Appeals held that the District Court's Order dismissing the action without prejudice was not appealable. (Petitioners' Appendix at A-18 - A-19.) Petitioners have not questioned that ruling in their Petition.

REASONS FOR DENYING THE WRIT.

The Petition for Certiorari should not be granted to review the unpublished decision of the Court of Appeals because (1) the decision rests on an issue of state law, (2) the decision does not present a conflict among the circuits, (3) the decision is not in conflict with the reported decisions of the Ninth Circuit, and (4) the decision presents no issue under Rule 23(e) of the Federal Rules of Civil Procedure.

A. The Court of Appeals' Decision Rests on an Issue of State Law.

The decision of the Court of Appeals rests squarely on a discretionary application of a state rule of attorney conduct. (Petitioners' Appendix at A-29 - A-30.) No federal issues — either constitutional, statutory, or common law — are addressed or presented. This Court should not and, pursuant to its own rules, will not grant certiorari to review the application of a principle of purely state law. Supreme Court Rule 17.

B. The Court of Appeals' Decision Does Not Present a Conflict Within the Circuits.

In one argumentative heading of their petition, Petitioners state that the unpublished decision of the Ninth Circuit conflicts with the decisions of other circuits. (Petition for Writ of Certiorari ("Petition") at 10.) Because the Ninth Circuit's decision is unpublished, has no precedential value, and cannot be cited even to the Ninth Circuit or to any District Court within the Circuit, 9th Cir. R. 21(c), it cannot present a conflict with the decisions of other circuits. In addition, it is clear from reading Petitioners' argument that what they are really complaining about is not a conflict among the circuits, but rather what they perceive as a conflict between the reported decisions of the Ninth Circuit and

the Ninth Circuit's unreported memorandum decision in this action. (Petition at 13.) Even if such a conflict did exist, the Supreme Court is not the proper forum for the resolution of intracircuit conflicts. *Davis v. United States*, 417 U.S. 333, 340 (1974); *Wisniewski v. United States*, 353 U.S. 900, 902 (1957).

C. The Court of Appeals' Decision Is Not in Conflict With the Reported Decisions of the Ninth Circuit.

Petitioners not only fail to demonstrate the existence of a conflict among the circuits, they fail even to demonstrate a conflict within the Ninth Circuit. Petitioners state that the general rule in the Ninth Circuit on a motion for disqualification under Rule 4-101 of the Rules of Professional Conduct of the State Bar of California is that the moving party must demonstrate more than merely a co-counsel relationship between original counsel and later counsel in order to warrant the disqualification of later co-counsel. (Petition at 10-13, citing *In Re Coordinated Pretrial Proceedings*, 658 F.2d 1355, 1361 (9th Cir.), cert. denied, 455 U.S. 990 (1982).) Petitioners then go on to state that "[t]he Ninth Circuit memorandum disregards these general rules; it conclusively presumes the opposite — that confidential information was transmitted and that an impropriety existed" (Petition at 13.)

Petitioners simply misstate the Ninth Circuit memorandum decision. The Ninth Circuit did not presume that confidential information was transmitted. The District Court had before it carefully worded attorney declarations which consistently failed to deny that information conveyed by Respondents to Latham & Watkins was communicated to all other counsel. The District Court also had before it declarations from Respondents which stated unequivocally that confidential information had been given to Latham & Wat-

kins. (Respondents' Appendix at A-3 - A-4, A-7, A-10.) On this record, where the attorneys carefully failed to deny the transmittal of the confidential information and where the district judge had before him three related actions, all with the same attorneys, the Court of Appeals held that the District Court had not abused its discretion in disqualifying Petitioners' counsel under Rule 4-101 without requiring further proof from Respondents. (Petitioners' Appendix at A-23, A-29 - A-30.) No presumption was involved.

D. The Court of Appeals' Decision Did Not Reach Any Issue Under Rule 23(e) of the Federal Rules of Civil Procedure; Nor Was Any Such Issue Raised by Petitioners Below.

Petitioners state that Latham & Watkins' promise to Respondents that the class would not sue them was in effect a class settlement not approved by the District Court as required by Rule 23(e) of the Federal Rules of Civil Procedure. This contention is not properly presented in this case, because the Court of Appeals expressly did not reach the issue of Latham & Watkins' promise not to sue; nor was Petitioners' contention concerning Rule 23(e) raised below.

A question presented for review in a petition for certiorari must properly arise in the record and must have been urged and briefed below. *Adickes v. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970); *California v. Taylor*, 353 U.S. 553, 557 n.2 (1957). The Supreme Court normally will not consider an issue if the Court of Appeals has not passed on it. *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 163 (1975). Only in "exceptional circumstances" will the Court deviate from its normal practice of not considering issues not presented or passed upon below. *United States v. Lovasco*, 431 U.S. 783, 788 n.7 (1977).

Latham & Watkins' promise not to sue was not a ground for the Ninth Circuit's memorandum decision affirming the District Court; in fact the Court of Appeals expressly did not reach that issue in its memorandum decision. (Petitioners' Appendix at A-30 - A-31.) Moreover, Petitioners did not so much as mention Rule 23(e) in the District Court or in their brief in the Court of Appeals. Their sole mention of Rule 23(e) is contained in one sentence in their reply brief in the Court of Appeals. In this one sentence, Petitioners do not argue that the District Court acted in contradiction to Rule 23(e) of the Federal Rules of Civil Procedure; they simply state that Respondents "know better than to argue that Latham had the power to bind *Muller* class members to a waiver of their claims without notice and court approval pursuant to Rule 23(e)." (Reply Brief at p. 4.) This sole reference to Rule 23(e), made in passing in a reply brief, does not rise to the level of urging and briefing the issue below.

CONCLUSION.

For the reasons set forth above, the Petition for a Writ of Certiorari is without merit and should be denied.

Dated: January 30, 1984.

Respectfully submitted,

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Sam Battistone, Jr.,
F. Newell Bohnett,
Owen Johnston, William L.
Wagner, George McKaig
and Bruce N. Anticouni.

APPENDIX.

Declaration of Owen Johnston.

United States District Court, Central District of California.

Phillip Emrich and Eric Gillberg, Plaintiffs, v. Sam Battistone, Sr.; Sam D. Battistone, Jr.; F. Newell Bohnett; Robert Hild; Owen Johnston; William L. Wagner, Sr.; George McKaig; Dan V. Angeloff; George A. Cavalletto; and Bruce N. Anticouni, Defendants. Case No. CV 81-4547 (JRx).

I, OWEN JOHNSTON, declare:

1. The matters declared herein are within my personal knowledge and I could competently testify thereto, if sworn as a witness.

2. I am a named defendant in this action (Emrich v. Battistone, et al.). I was associated with Sambo's Restaurants, Inc. for over ten (10) years and held the positions of Senior Vice President and Chief Financial Officer. I was an officer and director of Sambo's Restaurants, Inc. at all times relevant to the subject matter of this action. I am an investor in the joint ventures which are the subject of this action.

3. In early 1980, several people who participated in the joint ventures which are the subject of this action, including myself, got together to discuss their ownership interests and rights in regard to those joint ventures. An Organizing Committee composed of H. Oliver Dixon, Stanley L. Diemoz, Robert B. Elmerick and Noel Hayes was appointed to spearhead the formation of an Association to be made up of the owners of joint venture interests.

4. During the formation of this Association, I met with Robert Elmerick on numerous occasions and also with other members of the Organizing and later Executive Committees. The reasons I joined the Association and took an active part in its formation were:

(a) It was the only organized resistance to what the management of Sambo's Restaurants, Inc. was doing with the joint venture group administration;

(b) The Association was on record as stating that they wished to represent as many joint venture group holders of any kind that they could;

(c) I was offered, through my nomination to the Executive Committee of the Association, an opportunity to become closely involved and use my experience and knowledge of Sambo's Restaurants, Inc. activities to aid the Association.

5. The Association at first consulted with Phil Marantz of the law firm of Freshman, Mulvaney, Marantz, Cowsky, Forst, Kahan & Deutsch to investigate our legal rights with respect to joint venture interests. Mr. Marantz was known to many of us personally and was, at that time, acting as legal counsel for Sam D. Battistone, Jr., one of my co-defendants herein. He suggested we formally retain other attorneys, Latham & Watkins, a firm which he felt had the expertise and manpower to represent our interests. The Association did, in fact, retain Latham & Watkins in early 1980.

6. As a result of my close involvement with the Association's plans and goals and of my past positions in Sambo's Restaurants, Inc., my name was presented to the membership of the Association in nomination for a post on the Executive Committee. My name was submitted in a ballot dated February 20, 1980, a true and accurate copy of which is attached hereto as Exhibit A.

7. At the time of my nomination there was nothing said about any possible conflict of interest, and at all times in which I was involved in the Association, I believed our interests were not in conflict. The names of my co-defen-

dants herein, William Wagner, Sr. and Bruce Anticouni, were also submitted on this ballot.

8. The Executive Committee was to work with the Association's counsel, act as representatives for all of Sambo's joint venturers, protect the Association's interests, and to ascertain the full legal rights and benefits due to owners of joint venture interests.

9. Due to what Latham & Watkins characterized as a possible conflict of interest which might arise in future litigation the three of us had to decline our nominations to the Executive Committee. A true and accurate copy of a letter dated March 24, 1980, which states the results of the election for the Executive Committee, is attached hereto as Exhibit B.

10. Despite the fact that I had to decline my nomination to the Association's Executive Committee on the advice of counsel, I was later advised that I was nonetheless a viable member of the Association and that it would protect my interests. I was solicited for further contributions and encouraged to continue participating in the Association. Before contributing cash, I requested and received specific assurances from members of the Executive Committee that I would not be sued personally and that there was absolutely no possibility that the Association would not protect my interests. In reliance thereon, I continued to discuss the Association's activities with Robert Elmerick and other members of the Executive Committee, and to receive letters and reports on the progress of the Association.

11. I freely and willingly contributed any and all knowledge I had which was relevant to the facts being developed by Latham & Watkins on behalf of the Association. This included substantial amounts of confidential information in regard to the operation, management, and policies of Sam-

bo's Restaurants, Inc. during the time I served as an officer and/or director, including all of those times which are relevant to the subject matter of this action. I did, in fact, impart substantial amounts of such confidential information both to other members of the Association, members of its Executive Committee, and its attorneys based upon the clear understanding that the Association and counsel retained by it were representing my interests.

12. Based on the facts developed by it, Latham & Watkins recommended that a class action lawsuit be brought on behalf of the members of the Association and all those similarly situated against Sambo's Restaurants, Inc., United California Bank and Crocker Bank. This action, *Muller v. Sambo's Restaurants, Inc. et al.*, United States District Court for the Central District of California, Case No. CV 80-3757-R (JRx), was filed by Latham & Watkins on August 25, 1980. The plaintiff class in the *Muller* action was essentially made up of the members of the Association, of which I was still a member at the time the action was filed. It was not until the class was certified in December, 1980, that I was excluded from the class.

13. I believe that Latham & Watkins developed and filed the *Muller* class action complaint based on information which was in a large measure gained from confidential information which I shared with them during the period of time I understood them to be representing my interests.

14. In addition to contributing information, I also contributed substantial amounts of money to the Association for fees of legal counsel who were retained to represent our interests. On September 15, 1980, several weeks after the *Muller* action was filed, I wrote a check to the "Group 77/78 Trust" for \$5,100.00, which was my share based on a formula that the Association had developed based on units owned in joint venture groups. At the time I contributed

this money, I believed that the Association and Latham & Watkins were representing my interests. None of my contributions to the Association for costs and legal fees has ever been returned, nor has there ever been any offer to return them.

15. I have at no time consented to be sued by the Association and its attorneys on the basis of the information which I willingly supplied to them on the belief that an attorney-client relationship existed between said attorneys and me.

I declare under penalty of perjury that the foregoing is true and correct.

Executed at Santa Barbara, California, this 18 day of December, 1981.

/s/ Owen G. Johnston
Owen Johnston

Declaration of William L. Wagner, Sr.

United States District Court, Central District of California.

Phillip Emrich and Eric Gillbert, Plaintiffs, v. Sam Battistone, Sr.; Sam D. Battistone, Jr.; F. Newell Bohnett; Robert Hild; Owen Johnston; William L. Wagner, Sr.; George McKaig, Dan V. Angeloff; George A. Cavalletto; and Bruce N. Anticouni, Defendants. Case No. CV 81-4547 (JRx).

I, WILLIAM L. WAGNER, SR., declare:

1. The matters declared herein are within my personal knowledge and I could competently testify thereto, if sworn as a witness.

2. I am a named defendant in this action (Emrich v. Battistone, et al.). I was associated with Sambo's Restaurants, Inc. for ten (10) years and held the positions of Executive Vice President and member of the Board of Directors. I was an officer and director of Sambo's Restaurants, Inc. at all times relevant to the subject matter of this action. I am an investor in the joint ventures which are the subject of this action.

3. In early 1980, I met in Santa Barbara, California, with a group of people who were considering forming an Association to represent the owners of those joint venture interests. In attendance at the first meeting, which was held at Wayne Kees' residence, were approximately fifteen (15) people, including Eric Gillberg, a named plaintiff in this action. The next meeting I attended was held at the Pepper Tree Inn several months later. There was approximately forty (40) people in attendance. An Organizing Committee composed of H. Oliver Dixon, Stanley L. Diemoz, Robert B. Elmerick and Noel Hayes was appointed to spearhead this Association which was made up of the owners of the joint venture interests.

4. At these first two meetings, among the items discussed were possible litigation by and against Sambo's Restaurants, Inc. and possible litigation with United California Bank and Crocker Bank.

5. At these early meetings, the subject of the former officers and directors of Sambo's Restaurants, Inc. being part of the Association was discussed, with the result that we were asked to remain in the Association and to help and assist in any way possible.

6. During early 1980, the Association engaged the law firm of Latham & Watkins to represent the interests of the members of the Association. I attended a meeting in Santa Barbara, California, at the Great American Restaurant Company conference room at which a Mr. Poovey of Latham & Watkins was present and the various aspects of possible litigation against Sambo's Restaurants, Inc. and others were discussed. I attended one or two more meetings after that at which attorneys from Latham & Watkins were present and at which litigation strategy was discussed.

7. At these meetings, I willingly volunteered all knowledge I had which was relevant to the facts that the attorneys from Latham & Watkins were developing with respect to litigation against Sambo's Restaurants, Inc. and the banks. This included considerable confidential information regarding the operation, management and policies of Sambo's Restaurants, Inc. during the time I served as an officer and/or director, including all of those times which are relevant to the subject matter in this action. I contributed this information after having been assured that the Association had no intention of suing the former officers and directors of Sambo's Restaurants, Inc. and with the firm belief that the attorneys from Latham & Watkins to whom I was disclosing the confidential information were acting as attorneys for me and all other members of the Association. Had I not believe

this to be true, I would not have disclosed such information to those attorneys.

8. As well as attending these meetings and providing confidential information to legal counsel for the Association, I also paid a substantial amount of money toward the legal fees being incurred by the Association. On August 20, 1980, I wrote a check to the Association in the amount of Two Thousand Six Hundred Dollars (\$2,600.00) to help defray the fees for legal services being rendered by Latham & Watkins to the Association. I paid this amount with the understanding that it was going to pay the fees of attorneys who were representing my interests. I certainly would not have contributed this money had I thought that the same Association would later find it convenient to sue me.

9. While I was still a member of the Association, Latham & Watkins filed a class action lawsuit on behalf of the Association and others. This action is entitled *Muller v. Sambo's Restaurants, Inc., et al.*, United States District Court for the Central District of California, Case No. CV 80-3757-R (JRx). I feel that the *Muller* complaint was prepared, in part, on the confidential information which I supplied to Latham & Watkins during the time period I believed them to be serving as my attorneys.

10. I have at no time consented to be sued by the Association and its attorneys on the basis of information which I willingly supplied to them on the belief that an attorney-client relationship existed between said attorneys and me.

I declare under penalty of perjury that the foregoing is true and correct.

Executed at Santa Barbara, California, this 18 day of December, 1981.

/s/ William L. Wagner, Sr.

William L. Wagner, Sr.

Declaration of Bruce N. Anticouni.

United States District Court, Central District of California.

Phillip Emrich and Eric Gillberg, Plaintiffs, v. Sam Battistone, Sr.; Sam D. Battistone, Jr.; F. Newell Bohnett; Robert Hild; Owen Johnston; William L. Wagner, Sr.; George McKaig; Dan V. Angeloff; George A. Cavalletto; and Bruce N. Anticouni, Defendants. Case No. CV 81-4547 (JRx).

I, BRUCE N. ANTICOUNI, declare:

1. The matters declared herein are within my personal knowledge and I could competently testify thereto, if sworn as a witness.

2. I am a named defendant in this action (Emrich v. Battistone, et al.). I was associated with Sambo's Restaurants, Inc. for six (6) years and held the positions of Vice President and General Counsel. I was an officer of Sambo's Restaurants, Inc. at all times relevant to the subject matter of this action. I am an investor in the joint ventures which are the subject of this action.

3. At the beginning of 1980, a group of people who had also invested in the joint ventures were brought together to form an Association. This Association was organized primarily through the efforts of Bob Elmerick and Oliver Dixon for the purpose of taking legal action in response to what Sambo's Restaurants, Inc. was then doing with the joint venture group administration. I was approached to join the Association and did so.

4. During mid 1980, I attended two or three meetings held at the Invest West offices in Santa Barbara, California, which were called by Bob Elmerick to meet with attorneys from Latham & Watkins, the law firm hired by the Association to represent its interests. At those meetings, strategy for possible litigation was discussed and developed. In ad-

dition, I had one or possibly two telephone conversations with one or more attorneys at Latham & Watkins subsequent to those meetings in which we discussed various aspects of the litigation that they were proposing to bring on behalf of the Association.

5. During these meetings and telephone conversations, I willingly cooperated with the attorneys from Latham & Watkins and contributed all information which I felt I could legally and ethically divulge without violating any attorney-client relationship which might exist between Sambo's Restaurants, Inc. and me as a result of my service as its General Counsel. I did so with the clear understanding that, having been retained by the Association, Latham & Watkins was acting as legal counsel for me and all other members of the Association. Had I not understood and believed this to be the case, I would not have supplied the information that I did.

6. Sometime after being retained by the Association, Latham & Watkins recommended that a class action lawsuit be brought on behalf of the members of the Association and all those similarly situated against Sambo's Restaurants, Inc., United California Bank and Crocker Bank. Such a class action lawsuit was, in fact, filed by Latham & Watkins on August 25, 1980, and was entitled *Muller v. Sambo's Restaurants, Inc., et al.*, United States District Court for the Central District of California, Case No. CV 80-3757-R (JRx). Inasmuch as I was still a member of the Association at that time, I believed myself to be part of the plaintiff class in the *Muller* action. I remained a member of said plaintiff class until the class was certified in or about December, 1980, at which time I and other former officers and directors were excluded.

7. I feel that Latham & Watkins developed and filed the *Muller* class action complaint based in part on the in-

formation which I confided in them under the belief that they were acting as attorneys on my behalf.

8. In addition to meeting with legal counsel for the Association and supplying them with information, I contributed money to the Association for legal fees. When I was first approached to join the Association I was asked to pay \$100.00 toward legal fees and did so. This money was later returned to me by Latham & Watkins. However, subsequent to the filing of the *Muller* class action, I received a telephone call from Bob Elmerick and a personal solicitation from Oliver Dixon requesting that I remain a member of the Association because Latham & Watkins had apparently concluded that no conflict of interest existed between the former officers and directors of Sambo's Restaurants, Inc. and the other members of the Association and that no lawsuit would be filed by the Association against said former officers and directors. With this understanding and on the assumption that Latham & Watkins was representing my interests, I paid Oliver Dixon \$300.00 in cash to transmit to the Association for legal fees, which I believe was done. This \$300.00 sum has never been returned to me nor has there ever been an offer to return it.

9. I have at no time consented to be sued by the Association or its attorneys on the basis of the information which I willingly supplied to Latham & Watkins with the understanding that an attorney-client relationship existed between us.

I declare under penalty of perjury that the foregoing is true and correct.

Executed at Santa Barbara, California, this 18 day of December, 1981.

/s/ Bruce N. Anticouni
Bruce N. Anticouni

Declaration of George A. Cavalletto.

I, GEORGE A. CAVALLETTO, declare as follows:

1. I am a defendant in this action.
2. I was a director of Sambo's Restaurants, Inc. ("Sambo's") during 1977 and 1978 when units of Sambo's Restaurant Group 1977-1978 ("Group '77-'78") were offered and sold. I myself purchased 70 units of Group '77-'78 for a purchase price of \$210,000.
3. I resigned as a director of Sambo's on July 31, 1979.
4. In late 1979, the then current management of Sambo's decided to change several accounting practices relating to Group '77-'78, retroactive to January 1, 1979, thereby causing Group '77-'78 to reflect an operating loss for 1979 and triggering claims by United California Bank that its loans relating to Group '77-'78 were in default.
5. There was great concern among the Group '77-'78 investors, including myself, as a result of these developments, and various meetings were held to discuss what could be done about the problem.
6. It was determined at an early point that legal advice would be required in order to respond effectively to the problems of the Group '77-'78 investors.
7. On January 3, 1980, to help pay for such legal advice, I contributed \$100 to the Freshman, Mulvaney, Marantz, Comsky, Forst, Kahan & Deutsch Trust Account. This sum was later returned to me on June 5, 1980.
8. On May 15, 1980, I attended a meeting of Group '77-'78 investors at the home of Mr. Wayne Kees. This meeting is described in Paragraph 3 of the Declaration of Mr. William Wagner filed herein on or about December 21, 1981.
9. On July 9, 1980, I attended a meeting of Group '77-'78 investors at which attorneys Philip Marantz of Fresh-

man, Mulvaney, Marantz, Comsky, Forst, Kahan & Deutsch and Kenneth Poovey of Latham & Watkins made presentations and funds of legal expenses were solicited.

10. On August 12, 1980, I attended a meeting of about 10 to 15 individuals, primarily former officers and directors of Sambo's, at the offices of Invest West. (See Declaration of Bruce Anticouni filed herein on or about December 21, 1981, Para. 4.) Mr. Poovey made a presentation at this meeting, and funds were again solicited.

11. At this meeting, Mr. Poovey assured the former officers and directors of Sambo's in attendance, including myself, that we would not be sued by the Group '77-'78 investors.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on December 30, 1981, at Goleta, California.

/s/ George A. Cavalletto

GEORGE A. CAVALLETTO

Declaration of Robert L. Hild.

I, ROBERT L. HILD, declare as follows:

1. I am a defendant in this action.
2. I was a director of Sambo's Restaurants, Inc. ("Sambo's") during 1977 and 1978 when units of Sambo's Restaurant Group 1977-1978 ("Group '77-'78") were offered and sold. I myself purchased 100 units of Group '77-'78 for a purchase price of \$300,000.
3. I resigned as a director of Sambo's on July 31, 1979.
4. In late 1979, the then current management of Sambo's decided to change several accounting practices relating to Group '77-'78 retroactive to January 1, 1979, thereby causing Group '77-'78 to reflect an operating loss for 1979 and triggering claims by United California Bank that its loans relating to Group '77-'78 were in default.
5. There was great concern among the Group '77-'78 investors, including myself, as a result of these developments, and various meetings were held to discuss what could be done about the problem.
6. It was determined at an early point that legal advice would be required in order to respond effectively to the problems of the Group '77-'78 investors.
7. On December 20, 1979, to help pay for such legal advice, I contributed \$100 to the Freshman, Mulvaney, Marantz, Comsky, Forst, Kahan & Deutsch Trust Account. This sum was later returned to me on June 23, 1980.
8. On July 9, 1980, I attended a meeting of Group '77-'78 investors at which attorneys Philip Marantz of Freshman, Mulvaney, Marantz, Comsky, Forst, Kahan & Deutsch and Kenneth Poovey of Latham & Watkins made presentations and funds for legal expenses were solicited.
9. On August 12, 1980, I attended a meeting of about 10 to 15 individuals, primarily former officers and directors

of Sambo's, at the offices of Invest West. (See Declaration of Bruce Anticouni filed herein on or about December 21, 1981, Para. 4.) Mr. Poovey made a presentation at this meeting, and funds were again solicited.

10. At this meeting, Mr. Poovey assured the former officers and directors of Sambo's in attendance, including myself, that we would not be sued by the Group '77-'78 investors.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on December 31, 1981, at Santa Barbara, California.

/s/ Robert L. Hild
ROBERT L. HILD